

2-4.000

TIME TO APPEAL OR PETITION FOR REVIEW OR CERTIORARI

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2-4.110 Criminal Cases—Appeal by Government

Criminal appeals by the government under 18 U.S.C. § 3731 must be taken within 30 days after entry of the judgment or order appealed from. *See* F.R.A.P. 4(b). If the government seeks reconsideration of the adverse ruling within the 30-day period after the entry of the judgment or order, the 30-day period for filing the notice of appeals runs from the date of the entry of the order denying reconsideration. *See United States v. Dieter*, 429 U.S. 6 (1976).

If the appeal is from an order suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, the "United States attorney" must certify to the district court "that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." 18 U.S.C. § 3731 ¶ 2. The certification should be filed with the notice of appeal and it should be signed by the United States Attorney personally, or, if he or she is unavailable, by the attorney designated to act in his or her stead, *see* 28 C.F.R. § 0.136.

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2-4.112 Criminal Cases—Appeal by Defendant

Appeals by a convicted defendant must be taken within 10 days after entry of the judgment appealed from, unless a timely motion for new trial has been made—in which case an appeal may be taken within 10 days after entry of an order denying the motion. This time may be extended up to 30 days on a showing of excusable neglect. *See* F.R.A.P. 4(b).

2-4.113 Criminal Cases—Rehearing In Court of Appeals

Time to petition for rehearing in courts of appeals is 14 days. If it is desired to seek a rehearing en banc, a 30-day extension beyond the 14-day period should be requested in order for the request to be considered in the Department and for the Solicitor General to authorize the seeking of a rehearing en banc. *See* F.R.A.P. 26(b); 35; 40(a).

2-4.114 Criminal Cases—Petitions For Writs of Certiorari

Petitions for writs of certiorari to the Supreme Court by either party in a criminal case must be filed within 90 days after entry of judgment, but this time may be extended for a period not exceeding 60 days for good cause shown, provided the extension is requested at least 10 full days before the petition is otherwise due. *See* Rules 13.1, 13.5, Rules of the Supreme Court.

2-4.121 Criminal Cases—Collateral Relief—28 U.S.C. § 2255 and Habeas Corpus

Proceedings under 28 U.S.C. § 2255 and habeas corpus are treated as independent proceedings subject to the rules for civil cases for the purpose of computing time to appeal under the rules. This means that the time to appeal from the district court to the court of appeals is 60 days and the time to petition for a writ of certiorari is 90 days. *See* 28 U.S.C. § 2101(c); Rule 20.2, Rules of the Supreme Court.

2-4.122 Criminal Cases—Other

Other forms of relief such as an application for a writ of error coram nobis, a motion to correct an illegal sentence, or a motion for a new trial based on newly discovered evidence, are deemed to be made in the criminal case, and are therefore subject to the time limitations of criminal cases set forth above.

2-4.123 Criminal Cases—Mandamus

While there are no statutory time limits on filing a petition for mandamus authorized by the Solicitor General, such petition should be filed within a 30-day period from the entry of the order from which relief is sought. The timeliness of mandamus is usually measured under the doctrine of laches.

2-4.211 Civil Cases—Supreme Court Petitions for Certiorari

In all civil cases, petitions for writs of certiorari in cases to be taken to the Supreme Court from courts of appeals or from state courts must be filed within 90 days after the entry of judgment. *See* 28 U.S.C. §§ 1254, 1257, and 2101(c).

2-4.212 Civil Cases—Direct Appeals to the Supreme Court

Direct appeal to the Supreme Court is the appropriate avenue of review of decisions of three-judge courts granting or denying an injunction. *See* 28 U.S.C. § 1253. The time for appealing a decision under 28 U.S.C. § 1253 holding unconstitutional an Act of Congress is 30 days. 28 U.S.C. § 2101(a). The time for the filing of other direct appeals in the Supreme Court is either 30 or 60 days. *See* 28 U.S.C. § 2101(b). However, special statutes that authorize direct appeals to the Supreme Court (see below) may specify shorter appeal periods.

If a United States Attorney is working on a case in which a three-judge district court is convened, it is important to maintain close contact with the appropriate division to determine how to proceed in the event of an adverse judgment, or an appeal by an opposing party from a favorable judgment.

From time to time Congress provides for direct Supreme Court review of district court judgments in a particular kind of case. *See, e.g.*, 47 U.S.C. § 555(c)(2) (Cable Act); 2 U.S.C. § 692(b) (Line Item Veto Act). If the United States Attorney is working on a case in which direct appeal to the Supreme Court is provided for by statute, the United States Attorney should consult closely with the appropriate division as to how to proceed after judgment is entered by the district court.

2-4.220 Civil Cases—Appeals to Court of Appeals

Appeals generally in civil actions, in which the United States or an officer or agency thereof is a party, from judgments of the district courts to the courts of appeals, must be taken within 60 days after entry of the judgment or decree appealed from. *See* 28 U.S.C. § 2107; Rule 4(a)(1), F.R.A.P. In cases in which an officer of the United States is sued in his individual capacity, or both in his individual and official capacity, the 30-day time for appeal applicable to non-government parties, 28 U.S.C. § 2107; F.R.A.P. 4(a)(1), should be followed. In cases where the government is representing a non-government individual, such as a veteran, the 30-day time for appeal applies.

2-4.221 Civil Cases—Appeals to the Federal Circuit From District Courts

In some instances, a judgment of a district court is appealable only to the United States Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1292(c), (d)(4); 1295(a). The United States Attorney should be particularly alert to the provisions of 28 U.S.C. § 1295(a)(2), pursuant to which a case in which the district court's jurisdiction is based in whole or in part on the Little Tucker Act (28 U.S.C. § 1346(a)(2)), must be appealed to the Federal Circuit. Little Tucker Act cases are those in which there is a non-tort claim for money damages not exceeding \$10,000. If the United States Attorney has a case in which there is a claim for money damages not exceeding \$10,000, the United States Attorney should consult with the appropriate division before a notice of appeal is filed.

If a plaintiff files a suit for money damages in excess of \$10,000, the United States Attorney should consult with the appropriate division about seeking a transfer of the case to the Court of Federal Claims under 28 U.S.C. § 1631. An order granting or denying, in whole or in part, a motion to transfer to the Court of Federal Claims is immediately appealable as of right to the Federal Circuit. 28 U.S.C. § 1292(d)(4).

2-4.222 Civil Cases—Cross-Appeals

In all civil cases in which the United States or an officer or agency thereof is a party, if a timely notice of appeal is filed by any other party in the case, a notice of appeal (cross-appeal) by the United States, or officer or agency thereof may be filed within 14 days of the filing of the first notice of appeal or within the time otherwise prescribed for appeal (60 days from the entry of the judgment), whichever expires last (Rule 4(a)(3), F.R.A.P.). If the United States Attorney believes that a cross-appeal should be pursued, the United States Attorney should forward his or her recommendation to the appropriate division in the same manner as required for all other appeals.

2-4.250 Petition Requesting Rehearing In Banc

Effective December 1, 1994, Federal Rule of Appellate Procedure 40(a) has been amended to provide that "in all civil cases the time within which the United States or an agency or officer thereof may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order." The Appellate Rules Committee proposed this amendment, which is modeled on the D.C. Circuit's and the Tenth Circuit's local rules, because it accepted the Department of Justice's argument that the Solicitor General needs longer than the 14 days otherwise provided in Rule 40 to determine whether to file a rehearing petition and to prepare and file the petition. Since the Committee accepted the Department's argument that 45 days usually is sufficient, the Department should not request an extension of time to file a rehearing petition beyond the 45 day period without special justification.